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09/193,564

11/17/1998

JAY PAUL DRUMMOND

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06/19/2008

RALPH E. JOCKE  
walker & jocke LPA  
231 SOUTH BROADWAY  
MEDINA, OH 44256

EXAMINER

ELISCA, PIERRE E

ART UNIT

PAPER NUMBER

3621

MAIL DATE

DELIVERY MODE

06/19/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAY PAUL DRUMMOND, DALE BLACKSON,  
BOB A. CICHON, JOSEPH C. ESS, MARK A. MOALES,  
DAVID W. WEIS, MARK D. SMITH, and JAMES CHURCH

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Appeal 2008-1626  
Application 09/193,564  
Technology Center 3600

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Decided: June 19, 2008

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Before JOSEPH F. RUGGIERO, LANCE LEONARD BARRY, and  
HOWARD B. BLANKENSHIP, *Administrative Patent Judges*.

BARRY, *Administrative Patent Judge*.

ORDER REQUIRING ADDITIONAL BRIEFING BY APPELLANTS

I. STATEMENT OF THE CASE

A Patent Examiner rejected claims 1-20. The Appellants appeal therefrom under 35 U.S.C. § 134(a). We have jurisdiction under 35 U.S.C. § 6(b).

## II. LEGAL PRINCIPLES

The Board of Patent Appeals and Interferences has the "authority to set reasonable briefing requirements." *Putman v. Dudas*, 539 F.Supp.2d 414, 421 (D.C.C. 2008). Such requirements include instructing an appellant that "no 'prior briefs should be referenced or incorporated' in a subsequent filing." *Id.*

## III. ANALYSIS

Here, we previously issued an order remanding the application to the Examiner "to prepare a substitute examiner's answer that explains his rejections *in toto* rather than incorporating the rejections by reference." *Ex parte Drummond*, No. 2003-1621, at 3 (BPAI July 12, 2004). The order ended with instructions for each side. More specifically, we instructed the Examiner as follows: "the application is remanded to the examiner for further action not inconsistent with the views expressed herein. Any subsequent answer submitted by the examiner should be self-contained with respect to all rejections and arguments. No prior answer should be referenced or incorporated therein." *Id.* We likewise instructed the Appellants as follows: "[s]imilarly, any subsequent brief submitted by the appellants should be self-contained with respect to all arguments. No prior brief should be referenced or incorporated therein." *Id.*

Consistent with our instructions, the Examiner filed a substitute Examiner's Answer that was entirely self-contained and did not reference or incorporate his previous filing. The Appellants responded with a *3rd Reply Brief*. Their Brief, however, failed to adhere to our instruction that it "be

self-contained with respect to all arguments" *Drummond*, at 3, and that "[n]o prior brief should be referenced or incorporated therein." *Id.* To the contrary, the Appellants did just that. More specifically, they referenced the arguments made in three prior briefs, viz., "Appellants' Appeal Brief filed January 29, 2002; their Reply Brief filed May 9, 2002; and their Reply Brief filed January 28, 2003" (3rd Reply Br. 6), incorporating them by reference. (*Id.*)

#### IV. ORDER

After remanding the appeal to the Examiner to prepare a substitute examiner's answer that explains his rejections *in toto* rather than incorporating the rejections by reference, "[i]t would be unfair . . . to reward [the Appellants] for [their] mistake." *Putman*, 539 F.Supp.2d at 421. Instead, we order the Appellants to furnish a substitute brief that is self-contained with respect to all arguments. The substitute brief must repeat every argument that the Appellants want considered. Any argument made in their earlier briefs not so repeated will be waived. No prior briefs should be referenced or incorporated therein.

#### V. CONCLUSION

Under 37 C.F.R. § 41.50(d), we give the Appellants a non-extendable time period of thirty days within which to respond to this order. Failure to comply with the order within that time will result in the *sua sponte* dismissal of this appeal. 37 C.F.R. § 41.50(d).

Appeal 2008-1626  
Application 09/193,564

ORDERED

tdl/ce

RALPH E. JOCKE  
WALKER & JOCKE LPA  
231 SOUTH BROADWAY  
MEDINA OH 44256